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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY ALAN RHOADES, Defendant and Appellant.	2d Crim. No. B172779 (Super. Ct. No. VA077382) (Los Angeles County)

A jury found appellant guilty of assault by means likely to produce great bodily injury and found true the special allegation that appellant personally inflicted great bodily injury during the commission of the crime. (Pen. Code, §§ 245, subd. (a)(1); 12022.7, subd. (a).)[1] The trial court denied probation and sentenced appellant to six years in state prison, consisting of the mid-term of three years plus three years for the great bodily injury enhancement.

The victim, Santos Rodriguez (Santos), was a mental health worker in the psychiatric ward at Bellflower Medical Center. He was on duty during Superbowl Sunday when the number of visitors was larger than usual. Appellant's mother visited the ward and he became angry. After she left, Santos heard appellant

[1] All further statutory references are to the Penal Code.

threaten another male patient and told appellant, "Bradley, you can't be making any type of threats. It won't be tolerated." Santos asked one of the nurses to give appellant some medication to calm him down. He saw appellant put the medication in his mouth, but did not know whether he swallowed it.

A registered nurse standing nearby saw appellant punch Santos, knocking him to the floor. Santos lost consciousness. As he lay on the floor, appellant repeatedly punched and kicked him in the face until staff intervened. Santos was taken into the office, then rushed to the emergency room. He testified that he heard appellant call out, "Hey, Santos" and turned around. The next thing he remembered was being in the office, bleeding profusely, and being taken to the emergency room. He had no recollection of being punched. Santos suffered a broken nose, a fractured orbit around the right eye and lost six teeth. He was operated on immediately after the assault and a metal plate was placed behind his eye to hold it into his socket. He has undergone three surgeries to repair broken facial bones.

At a pre-trial conference defense counsel indicated a doubt as to appellant's competence under section 1368. The court declared a doubt, suspended criminal proceedings and referred the matter for a mental competency hearing. Several weeks later appellant was found competent and criminal proceedings were reinstated. The court ordered a pre-plea report under section 1203.7 and a psychiatric evaluation.

Probation Report and Psychiatric Evaluation

The probation officer recommended a suspended sentence, with defendant placed on five years' formal probation. The report reflected that the crime involved a single circumstance in aggravation (great bodily harm) and a single circumstance in mitigation (no prior convictions). The probation officer suggested that the court impose the midterm should it choose to sentence appellant to prison.

According to the probation report, appellant stated that he is bipolar, schizophrenic and receives SSI (Supplemental Security Income) for his mental problems. His mother is his conservator and gives him $20 month. The report made reference to appellant's psychiatric hospitalizations and quoted the investigating detective who believed appellant "is a danger to society [and has] serious mental problems."

A psychiatrist, Dr. Stephen M. Mohaupt, prepared a written evaluation of appellant's condition. He based his report on an interview with appellant, the police report and medical records from Bellflower Medical Center. Dr. Mohaupt stated that appellant has been diagnosed as paranoid schizophrenic. He has auditory hallucinations, is paranoid and often irritable and agitated.

Dr. Mohaupt reported that, according to hospital records, appellant frequently threatened staff members. He would wave his fists and issue threats and sometimes charge at staff, turning away at the last moment. While hospitalized, he had assaulted another staff member and another patient. Dr. Mohaupt believed that the instant offense was due to appellant's "difficulty regulating his emotions and not a product of his psychosis." He concluded the assault was likely caused by appellant's anger for being involuntarily hospitalized and was not "a direct result of his psychosis."

Sentencing

At the probation and sentencing hearing, the court considered the probation report and the evaluation by Dr. Mohaupt. Defense counsel requested the court to follow the recommendation of the probation officer and order probation. The trial court denied probation and sentenced appellant to six years in state prison. Appellant did not ask the court to order a diagnostic evaluation under section 1203.03.

Several weeks later, appellant moved the court to recall the sentence under section 1170, subdivision (d). He requested the court to refer him for

diagnosis and treatment by the department of corrections under section 1203.03[2] and to strike the great bodily injury enhancement in light of his mental condition.

At a hearing on the motion the trial court inquired why a diagnostic report was necessary. "Is the purpose of the report just so he can get his better treatment, or is the purpose of that to try to persuade me to grant him probation?" Appellant's counsel stated, "I'm not asking for it for the purpose of granting probation but for the purpose of appropriate treatment within the prison system."

Defense counsel asked the court to strike the great bodily injury enhancement because imprisonment alone would not address the treatment of appellant's mental illness. The People acknowledged the existence of appellant's mental problems, stating that earlier proceedings had been suspended when questions arose as to his competence. "That being said, your honor, [appellant] is quite a violent young man. . . . We have a victim who basically lost an eye as a result of the attack by [appellant]. He's shown a propensity for violence."

The trial court relied on the report of Dr. Mohaupt that appellant's actions were the result of his lack of impulse control rather than his psychiatric problems. "Well, I heard the case. It was a brutal attack. I don't know how many surgeries the victim went through, but it was so significant, indeed, he was a mature man who broke down on the stand while he was relating those injuries because it just completely changed his life. The defendant attacked him without provocation. He attacked him by surprise. He ambushed him. He went down. And he kicked him in the face when he was down. So he's a very, very violent person. So there is

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[2] Section 1203.03, subdivision (a) reads in pertinent part, "In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period."

no way I would ever put him on probation. He's just very, very violent. The [great bodily injury enhancement] I think was certainly warranted. [¶] . . . I think the sentence given was appropriate. I'm not inclined to recall the sentence. So the motion to recall the sentence is denied." In response to an inquiry by appellant's counsel, the court indicated that its denial included the request for a diagnostic study.

DISCUSSION

Appellant argues that the trial court abused its discretion by failing to recall the sentence under section 1170, subdivision (d) and by refusing to order a diagnostic study under section 1203.03. He contends that a diagnostic study would have assisted the court in determining whether the sentence was appropriate, given his mental condition. Appellant also claims the trial court should have stricken the enhancement for great bodily injury. In his reply brief he asserts that the psychiatric ward was understaffed, which contributed to his agitation on the day of the offense.

Appealability

The People argue that denial of the motion to recall appellant's sentence is not appealable. Section 1170, subdivision (d), permits the court to recall a sentence on its own motion but it does not confer such a right upon a defendant. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725.) There are two circumstances under which a defendant may appeal: from a "final judgment of conviction" or "from any order made after judgment which affects the substantial rights of the party." (§ 1237.) Because a defendant has no standing to bring a motion to recall his sentence under section 1170, subdivision (d), denial of the motion does not affect his substantial rights and is not appealable. (*Pritchett,* at p. 194; *Chlad,* at p. 1725; *People v. Gainer* (1982) 133 Cal.App.3d 636, 641.) Notwithstanding, we address appellant's arguments on the merits.

Diagnostic Evaluation

Section 1203.03 permits the trial court to order the defendant to be placed in a psychiatric facility for up to 90 days. The purpose is to obtain social and psychological information relevant to sentencing. (*People v. Myers* (1984) 157 Cal.App.3d 1162, 1169.) The court may make an order for placement when it concludes that a diagnostic report is necessary to a just disposition of the case. (*People v. Peace* (1980) 107 Cal.App.3d 996, 1001.) However, there is no abuse of discretion when a trial court chooses not to order a diagnostic study. (*Myers,* at p. 1169.)

In *Peace* the trial court did not order a psychiatric report and relied only on the probation report to impose a prison sentence. The reviewing court concluded there was no abuse of discretion because the probation report contained ample information concerning the defendant's mental condition. (*People v. Peace, supra,* 107 Cal.App.3d at p. 1001.) "The fact that the trial judge used his discretion in a manner different from that requested or suggested by appellant, does not mean that the trial judge abused his discretion." (*Ibid.*) There is no abuse of discretion unless the trial court's ruling exceeds the bounds of reason. (*Id.* at pp. 1001-1002.)

The *Myers* court likewise did not order a psychological examination to aid in sentencing. There was no abuse of discretion because the record contained extensive evidence of the defendant's mental health. His mental instability was argued by defense counsel in his statement of mitigation and at sentencing and the probation report was discussed. The court concluded that a psychological exam was unnecessary because the defendant had reoffended despite 42 months of intensive psychological counseling. (*People v. Myers, supra,* 157 Cal.App.3d at p. 1169.)

Appellant does not specify what psychiatric information a diagnostic evaluation might have revealed. However, he contends that Dr. Mohaupt's report was inadequate because he failed to consider that the ward was understaffed, appellant was agitated and he may not have been medicated at the time of the

attack. He reasons that these factors reduce his culpability. We reject this argument. In making its determination, the trial court had before it a recent psychiatric evaluation as well as a probation report that referred to appellant's mental condition. There is no indication that a 90-day observation of appellant and a psychological evaluation was necessary to a just disposition of the case.

For the reasons outlined above, we reject appellant's argument that the court should have ordered a diagnostic study to determine if the great bodily injury enhancement should have been stricken. As the trial court noted, the attack was brutal and unprovoked. The court relied on the psychiatric report indicating that the assault resulted from appellant's emotional problems rather than his psychosis. Under these circumstances, the trial court did not abuse its discretion in denying the motion to recall the sentence.

Cruel and Unusual Punishment

Appellant argues that his sentence constitutes cruel and unusual punishment under the state and federal constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.) A punishment may be cruel and unusual if it is so disproportionate to the crime that it "'shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825; *In re Lynch* (1972) 8 Cal.3d 410, 424.) When analyzing a claim of disproportionality under the state Constitution, we examine (1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offense in other states. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-429; *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Appellant states that he does not challenge the proportionality of his sentence as compared to greater offenses in California or similar sentences in other states. He addresses only the first prong in *Lynch,* contending that his six-year sentence is "disproportionate to his individual culpability." He reasons that he should be considered less culpable due to his youth (age 21), that he is a first-time

offender and suffers from paranoid schizophrenia. Under these circumstances, appellant argues, his sentence "shocks the conscience and offends fundamental notions of human dignity."

Appellant's sentence is reasonably proportional to the offense and the offender. Although he had no known prior convictions, the attack was brutal. The psychiatric report indicated that attack was not precipitated by appellant's mental illness, but by his difficulty regulating his emotions. His culpability was not reduced by his mental condition.

There is no merit to appellant's argument that his sentence violates the Eighth Amendment. (*Parke v. Raley* (1992) 506 U.S. 20, 27; *Lockyer v. Andrade* (2003) 538 U.S. 63; *Ewing v. California* (2003) 538 U.S. 11*; Harmelin v. Michigan* (1991) 501 U.S. 957, 962; *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.) The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Raul A. Sahagun, Judge

Superior Court County of Los Angeles

Carol S. Boyk, under appointment by the court of appeal, for Defendant and Appellant.

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